

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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In the Matter of)

AT&T Contract Tariff No. 374)
_____)

) Transmittal Nos.

) CT 2952 and CT 3441

) CC Docket No. 95-133

REPLY OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its
the Comments and Opposition¹ to the Direct Case AT&T filed
in response to the Common Carrier Bureau's August 11, 1995
Designation Order in this proceeding.²

In its Direct Case, AT&T demonstrated that the
revisions to CT 374 would have only beneficial effects on
the Customer. These tariff changes consist of rate
reductions (accomplished through higher discounts)³ and

¹ The Furst Group, Inc. ("TFG" or "the Customer") filed an
Opposition to AT&T's Direct Case; two other parties --
the Telecommunications Reseller Association ("TRA") and
the Ad Hoc Telecommunications Users Committee ("Ad Hoc")
-- submitted comments.

² In the Matter of AT&T Contract Tariff No. 374, DA 95-1784
(Com. Car. Bur. August 11, 1995).

³ The rate reductions, itemized in a chart on Page 13 of
the Direct Case, range from 0.8% to 6.4%. (Rates are
unchanged for SDN Service Schedule B and MEGACOM® 800
Service.)

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provisions requiring further increased discounts to offset any future increases in relevant baseline rates under AT&T Tariff Nos. 1 and 2.⁴ In its Opposition, The Furst Group, Inc. ("TFG") acknowledges the revisions reduce rates, but asserts they also "make other changes which harm TFG."⁵ Yet TFG fails to show any instance in which it would be better off under the current tariff than under the pending revisions. In fact, as the following "before and after" chart shows, each of the proposed changes benefits TFG:.

| <u>Item</u> | <u>Current Provision</u> | <u>Proposed Change</u> |
|---|--|---|
| Contract Price (Section 4) | No provision for adjustments to Section 5 discounts. | Section 5 <i>discount levels would be increased semi-annually in the event of certain increases to Tariff 1 and Tariff 2 prices</i> <u>Beneficial Change.</u> |
| SDN Int'l Discounts (Section 5.A.1. & 5.B.1) | Discounts range from 11.3% to 16.3%. | Discounts continue to range from 11.3% to 16.3% for months 1-17 of the term, thereafter, discounts range from 14.1% to 19.1%, reflecting rate reductions of 0.8% to 2.8% <u>Beneficial Change.</u> |

⁴ The Contract Prices under CT 374 are based on Tariff 1 and 2 rates, "as amended from time to time." CT 374, §4. There is currently no provision in the CT 374 that calls for any modification of discount levels in the event of increases in the underlying rates.

⁵ TFG Opposition at 4.

| <u>Item</u> | <u>Current Provision</u> | <u>Proposed Change</u> |
|---|--|---|
| SDN Rate Schedule A (Section 5.A.2 & 5.B.2) | Discount is 13.3%. | Discount continues to be 13.3% for months 1-17 of the term, thereafter, the discount is 19.7%, reflecting a rate reduction of 6.4% <u>Beneficial Change.</u> |
| AT&T READYLINE- Domestic Service (Section 5.A.4 & 5.B.4.) | Discounts range from 11.3% to 29.1%. | Discounts continue to range from 11.3% to 29.1% for months 1-17 of the term, thereafter, discounts range from 17.9% to 34.3%, reflecting rate reductions of 5.2% to 6.6% <u>Beneficial Change.</u> |

Despite these clear benefits, TFG claims that the changes "materially, adversely, and unjustifiably affect TFG's rights."⁶ As demonstrated below, TFG is wrong with regard to each of its claims of adverse impact.

First, TFG claims that the proposed changes limit its ability to discontinue its existing subscription by reordering CT 374.⁷ TFG is wrong. The revisions do not affect the discontinuance without liability provision, under which TFG can discontinue without liability "only by

⁶ Id. at 2.

⁷ Id. at 2-3. TFG's argument that the original tariff conferred an endless right to continue reordering the tariff on its original terms is non-sensical. Under TFG's view, it could secure perpetual rates by continuously resubscribing on the same terms agreed to in 1993. The tariff has a three-year term with a one year renewal option. The Customer has no right to service at the same terms beyond that four-year period.

replacing the services provided under this Contract Tariff with services provided under another Contract Tariff, or under AT&T Tariff F.C.C. Nos. 1, 2, or 12, with revenue, volume and term commitments at least equivalent to those provided under this Contract Tariff."

Second, TFG's argument that proposed increases in volume thresholds for SDN International discounts "obviously result[] in charges higher than warranted" misleadingly implies that there is a rate increase for an existing customer and therefore the need for a substantial cause test. To the contrary, as demonstrated in the Direct Case, the proposed revisions result in a net rate decrease at every volume level.⁸ TFG's description of the revised tariff charges as "higher than warranted" is just an artful way to complain that the reductions caused by the increased discount levels would have been even greater, had the volume thresholds not also been adjusted.

⁸ As AT&T demonstrated in its Direct Case, the substantial cause test does not apply to these revisions in any respect. But TRA's argument that the Sierra-Mobile doctrine should apply instead of the substantial cause test (TRA Comments at 14-23) is equally wrong. As the Bureau has recently ruled, the Sierra-Mobile doctrine is inapplicable to Contract Tariff revisions because they are generally available "schedules of charges," not carrier-to-carrier contracts. In the Matter of AT&T Communications Contract Tariff No. 360, DA 95-1244 (Com. Car. Bur. June 6, 1995) at ¶11.

Such a complaint is not a basis for applying the substantial cause test, which protects customers who enter long-term service arrangements with a "legitimate expectation" of stability.⁹ TFG's contention, though, is that it is entitled to even lower rates, and that issue is appropriately resolved through its pending Formal Complaint proceeding, and not in this tariff review proceeding.¹⁰

TFG contends that the rate reductions do not go far enough, and that the Commission should therefore reject the pending revisions (which implement the carrier's view of the appropriate rate reductions), even though as a result the current higher rates remain in effect. This position is not only illogical, it is also counterproductive.¹¹ If the

⁹ In the Matter of RCA American Communications, Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, 86 F.C.C.2d 1197, 1201 (1981).

¹⁰ Ad Hoc appears to argue that the Commission should use the tariff review process to evaluate whether a proposed tariff revision is inconsistent with a contract requirement, even if the revision on its face has no adverse effect on the customer. Ad Hoc Comments at 3-4. The law, however, is clear that alleged differences between non-tariffed contractual terms and a filed tariff change is not a basis for rejecting the change. In the Matter of Midwestern Relay Co., Revisions to Tariff F.C.C. No. 11, 69 F.C.C. 2d 409, 412-413 (1978) (emphasis added), aff'd, American Broadcasting Companies, Inc. v. F.C.C., 643 F.2d 818 (D.C. Cir. 1980). See also Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990).

¹¹ The seeming illogic of TFG's protesting reduced rates, which TRA points to as evidence that there must be something adverse in the proposed changes (TRA Comments

(footnote continued on following page)

rate reductions had taken effect, AT&T would be charging the rate it believes is appropriate, and TFG at least would receive a portion of the cost reduction to which it claims entitlement, without being precluded from pursuing its claim for further "damages" through its Formal Complaint proceeding.¹²

Third, TFG argues that the proposed changes impair "its right, under the Contract, to have its rates reviewed every six months and adjusted according to a predetermined formula."¹³ Once again, TFG is wrong. Far from impairing TFG's rights, these revisions provide TFG an enforceable tariffed right to have rates adjusted every six months. In its Opposition, TFG asserts that the revisions do not conform with the agreed upon formula,¹⁴ but in a prior

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at 10), is cleared up to some extent when it is understood that TFG is at the same time unlawfully refusing to pay the current tariffed rates.

¹² TFG also argues that these revisions would undermine its position in the Formal Complaint, suggesting that if a second customer orders service under CT 374, the Enforcement Division would be unwilling to grant TFG's request for an order directing AT&T to lower rates because the second customer might object to the rate reduction. TFG Opposition at 3-4. This imaginative and highly contrived scenario is simply unrealistic. What other customer would share TFG's apparent aversion to lower rates?

¹³ TFG Opposition at 3.

¹⁴ The Contract provides a formula for determining the "Change Percentage," which is the percentage by which

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submission to the Commission, TFG has characterized the Contract as requiring that AT&T "perform semiannual evaluations of its rates to TFG," and that "if rates under Tariffs 1 and 2 rose following the effective date of Contract Tariff 374, TFG's rates under the Contract Tariff were to be adjusted so that they remained stable."¹⁵ This is exactly what the proposed revisions accomplish.

Finally, TFG complains that the revisions provide no adjustment for the first 21 months of service.¹⁶ TFG is now in its twenty-sixth month of service, and any prospective changes in rates cannot reduce the charges TFG has incurred for prior months at the existing rates. TFG's

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standard tariff rates have changed since the Initial Service Date. AT&T is required to file tariff changes only if the Change Percentage is less than zero (reflecting that standard tariff rates have decreased). Contract, Attachment B at page 2. Standard tariff rates have increased, not decreased, since TFG's initial service date, so the Contract formula requires no change to the Contract Tariff.

¹⁵ The Furst Group, Inc. v. AT&T Corp., File No. E-94-72, Brief of Complainant, The Furst Group Inc. at 2, 14 (filed January 13, 1995) (the "TFG Brief").

¹⁶ In fact, the lower rates would begin to apply in the eighteenth month of service (TFG was in its eighteenth month of service at the originally scheduled Tariff Effective Date.) As a result of the suspension of the rate reductions, however, TFG has now gone through an additional eight months (and counting) at the higher rates, and has incurred millions of dollars of additional liabilities. The new rates obviously will not apply to TFG unless and until they are permitted to take effect.

suggestion that AT&T should provide retroactive rate relief is, of course, entirely inappropriate.

Clearly, this is a most unusual proceeding. TFG is arguing strenuously against a rate reduction that AT&T wishes to implement. TRA has made a suggestion that could resolve this stalemate. Specifically, TRA argues that TFG should not be bound to a long-term tariff arrangement to which it has not agreed, and suggests "grandfathering."¹⁷ AT&T certainly has no objection to "grandfathering" TFG in this instance, and is prepared to modify the pending revisions to provide this option for TFG if that would resolve this tariff proceeding. Of course, TFG would need to pay the existing tariffed rates. And TRA's proposal highlights the need for some election here: TFG should not be able to sue and recover as "damages" rate reductions that it claims are necessary, but, which, for reasons of its own, it blocks or refuses to accept.

The above discussion demonstrates that it makes no sense to apply the "substantial cause" test to a situation where a filed tariff changes a term plan to a customer's benefit. The customer's legitimate expectation interests are not implicated, and the sort of balancing required by the test yields no counterweight to the carrier's right to

¹⁷ TRA Comments at 14.

submit tariffs within the zone of reasonableness. That TFG apparently wishes to block a rate reduction as part of its litigation strategy is not a sufficient reason to prevent the instant tariff filings from taking effect.

Conclusion

This proceeding establishes, beyond doubt, that there is no need to apply the substantial cause test when a Customer seeks to block the effectiveness of rate reductions. Nor do Transmittal Nos. CT 2952 and CT 3441 conflict with the Communications Act or with any Commission rule or order. Accordingly, the Commission should conclude this investigation as promptly as possible and permit the tariff revisions to take effect.

Respectfully submitted,

AT&T CORP.

By: _____



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Dated: September 15, 1995

CERTIFICATE OF SERVICE

I, Rita Foxwell, do hereby certify that on this 15th day of September, 1995 true and correct copies of the foregoing Reply of AT&T Corp. were served upon the following parties in the manner indicated:

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